

**IN THE CHANCERY COURT OF HARRISON COUNTY
FIRST JUDICIAL DISTRICT**

**DAVID WHITEHEAD and
MARK WARD, d/b/a PROFESSIONAL
BENEFIT SERVICES**

PLAINTIFFS

v.

Civil Action No. 99-02511

**ERIC CLARK, in his Official Capacity
As Secretary of State for the State of
Mississippi and PHOENIX TELECOM, LLC**

DEFENDANTS

**BRIEF IN SUPPORT OF DEFENDANT ERIC CLARK'S MOTION TO
STRIKE AND DISMISS DEFENDANT PHOENIX TELECOM'S CROSS-CLAIM**

COMES NOW, Eric Clark, in his official capacity as Secretary of State for the State of Mississippi (hereafter "Clark"), and submits this Brief in Support of his Motion to Strike and Dismiss Defendant Phoenix Telecom's Cross-Claim pursuant to Rule 46(b) of the Mississippi Rules of Appellate Procedure and Rule 41(b) of the Mississippi Rules of Civil Procedure.

Introduction.

The Plaintiffs filed a Petition for Declaratory Relief in this Court on October 1, 1999. In response, Clark filed a Motion to Dismiss, citing as one of his grounds insufficiency of service of process. On November 15, 1999, at a hearing on Clark's Motion to Dismiss, attended by counsel for all the parties, including Timothy D. Crawley, on behalf of Phoenix Telecom, LLC (hereafter "Phoenix"), the Court ruled that service was defective. Plaintiffs were ordered to re-serve Clark in the manner provided by Miss. R. Civ. P. 4(d)(5).

On November 16, 1999, the Office of the Secretary of State issued a Summary Cease and Desist Order and Notice of Intent to Impose Administrative Penalty against

Plaintiffs, Phoenix, and other parties. See, Exhibit A attached to Clark's Motion. After the Summary Cease and Desist Order was issued, Plaintiffs served their petition on the Attorney General as required by Miss. R. Civ. P. 4(d)(5).

On December 15, 1999, Clark timely filed his answer to the Petition for Declaratory Relief. The next filing occurred on January 10, 2000, when Phoenix filed an Answer and Cross-Claim in response to Plaintiffs' Petition. Phoenix filed its Answer and Cross-Claim despite the fact that it has not been served.¹ Clark has now filed a motion to strike and dismiss Phoenix's cross-claim on the grounds that Phoenix's counsel has not been admitted *pro hac vice*.²

Argument.

Phoenix claims in its Answer and Cross-Claim that it makes its appearance by and through its attorneys of record, "Hopkins, Crawley, Bagwell & Upshaw, P.L.L.C. and Friedman, Dever and Merlin, L.L.C." See, Exhibit B, page 1 unnumbered paragraph 1, to Clark's Motion. This pleading further reveals that Friedman, Dever & Merlin, L.L.C. is located in Atlanta, Georgia, and a check of the Mississippi Bar rolls revealed that H. Michael Dever, named as counsel for Phoenix in its Answer and Cross-Claim, is not licensed to practice law in the State of Mississippi.

Before an attorney not licensed in Mississippi makes an appearance in either a court or an administrative body of this state, that attorney must move the subject tribunal

¹ According to the Chancery Clerk's office, the only returns noted on the computer in this file were for the first attempted service upon Eric Clark and the second completed service upon Eric Clark. One is, therefore, left with the question of why Phoenix responded to a complaint despite the fact that it has not been served.

² Clark has raised other grounds in support of dismissal in his Answer to the Cross-Claim, but reserves those issues for presentation to the Court at a later date.

for admission *pro hac vice*. Miss. R. App. P. 46(b). According to Miss. R. App. P. 46(b)(1),

An attorney who is not licensed in good standing to practice law in Mississippi, but who is currently a member in good standing of the bar of another state, the District of Columbia, or another American jurisdiction (hereinafter called a foreign attorney), and who is of good moral character and familiar with the ethics, principles, practices, customs, and usages of the legal profession in this state, may appear as counsel *pro hac vice* in a particular cause before the Supreme Court or the Court of Appeals or any court or administrative agency in this state upon compliance with the conditions stated in this subdivision.

Id.

The rule provides five (5) steps the foreign attorney must complete before he gains admission *pro hac vice*. First, the foreign attorney must study and comply with the standards of professional conduct required of members of the Mississippi Bar. Miss. R. App. P. 46(b)(2). Second, the foreign attorney must associate local counsel. Miss. R. App. P. 46(b)(3). Third, the foreign attorney is required to submit an affidavit to the tribunal before whom he wishes to appear. **“Such affidavit shall be filed not later than the first occasion on which the foreign attorney files any pleading or other paper in the case or appears personally before the court or administrative agency.”** Miss. R. App. P. 46(b)(4). (Emphasis added). Fifth, if the subject court or administrative agency grants the motion for admission *pro hac vice*, then the foreign attorney is required to submit a certified copy of the order to the Clerk of the Mississippi Supreme Court. The authority to appear shall become effective only when the order is filed with the Supreme Court. Miss. R. App. P. 46(b)(5).

Failure to comply with this rule has serious consequences. In fact, “Any pleadings or other papers filed in violation of this rule shall be stricken from the record

upon the motion of any party or by the court or administrative agency *sua sponte*.” Miss. R. App. P. 46(b)(9)(i).

In the instant case, counsel for Phoenix has only complied with one of the rule’s requirements. It appears that local counsel has been associated. However, the foreign attorney has not filed the informational affidavit, has not been granted permission to appear in this matter, and has not filed the requisite order with the Supreme Court. In spite of these violations, Mr. Dever appears before this Court on behalf of Phoenix in a pleading signed by Mr. Crawley, all in contravention of Miss. R. App. P. 46(b).

The Mississippi Supreme Court has addressed the issue of failing to follow the rule that governs admission *pro hac vice*. In Terrell v. Tschirn, 656 So. 2d 1150 (Miss. 1995), the plaintiff’s lawyer who was a member of the Louisiana Bar, failed to comply with the rule regarding admission *pro hac vice*. This issue was not raised by the defendant’s lawyer until he filed post trial motions. The trial court ruled that the motion was untimely and denied the requested relief. On appeal, while addressing the timing of the defendant’s Motion to Strike Pleadings and Set Aside Judgment, the Supreme Court , held that because of the foreign lawyer’s failure to follow the applicable rule, upon proper motion by the defendant the pleadings would have been stricken from the record. Id. at 1152.

If the Court simply strikes the cross-claim, then counsel for Phoenix will suffer no greater sanction than the inconvenience of actually following the rules. In other words, counsel for Phoenix will re-file the cross-claim upon admission *pro hac vice* or, in the alternative, the foreign attorney’s name will be removed from the pleading. In addition to striking the cross-claim, this Court should dismiss it with prejudice because Phoenix

has failed to comply with the rules of court. Mississippi Rule of Civil Procedure 41(b) allows the court to dismiss an action involuntarily for three different reasons including failure to comply with the rules:

“For failure to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.”

Miss. R. Civ. P. 41(b). The provisions of Miss. R. Civ. P. 41 apply to cross-claims as well. Miss. R. Civ. P. 41(c). Rather than giving counsel a second bite at the apple, the Court should use the authority granted in Miss. R. Civ. P. 41(b) and dismiss the cross-claim with prejudice.

In Taylor v. General Motors Corporation, 717 So. 2d 747 (Miss. 1998), the Mississippi Supreme Court unanimously affirmed the lower court’s decision to strike a complaint pursuant to Miss. R. App. P. 46(b)(9)(i) and dismiss the case pursuant to Miss. R. Civ. P. 41(b). In Taylor, the plaintiff’s lawyer, Harry Boyer, who was only licensed in Louisiana, filed a lawsuit against General Motors Corporation. On the same day that he filed the complaint, Boyer also filed a motion requesting he be admitted *pro hac vice*. His motion contained a defective affidavit and on the motion of defense counsel, the court ordered Boyer to file the proper affidavit. Id. at 748. Again, Boyer filed a second affidavit that was also incorrect. As a result of Boyer’s failure to file the proper affidavit, the court denied his motion for *pro hac vice* admission, struck the complaint from the record and dismissed the cause with prejudice. Id.

On appeal, the Supreme Court treated the trial court’s dismissal as an adjudication upon the merits pursuant to Miss. R. Civ. P. 41(b). Id. at 748. Therefore, the standard of review was one of abuse of discretion. Id. The appellant argued that the trial court did

abuse its discretion by not using less drastic sanctions such as fines or costs. The Court rejected the appellant's argument and held that "[t]he result of Boyer's failure to properly comply with M.R.A.P. 46 was for the trial court to strike [the complaint] as stated in M.R.A.P. 46(b)(8)(i) and pursuant to Rule 41(b) to dismiss the case." Id. at 749. The Court went on to note that the issue presented in Taylor was the very same issue presented in Tschirn and reiterated that, when an attorney violates Miss. R. App. P. 46(b), upon proper motion the pleadings shall be stricken from the record.

Conclusion

"It is firmly rooted that the admission of a foreign attorney to practice *pro hac vice* in this state is governed by certain requirements contained in M.R.A.P. 46." Taylor at 750. Counsel for Phoenix has failed to comply with these requirements and has violated the Mississippi Rules of Civil Procedure. Therefore, the cross-claim should be stricken as mandated by Miss. R. App. P. 46(b)(9)(i) and dismissed with prejudice as provided in Miss. R. Civ. P. 41(b).

Respectfully submitted this the _____ day of February 2000.

ERIC CLARK,
Secretary of State

BY: _____
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Certificate of Service

I, Joseph Brady, Senior Attorney, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing to the following:

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This the _____ day of February 2000.

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